AUG 23 1950
CHARLES ELMORE CROP
CLE

United States of America

In the

# Supreme Court of the United States

October Term, 1950

No. 262

CHARLES A. CAROLIN,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

WILLIAM A. ALFS,
(DONALD K. TYLER, Of Counsel)
Attorneys for Petitioner,
1906 Dime Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit, Michigan

## INDEX


| | Page |
|---|---|
| Petition for a Writ of Certiorari | 1-6 |
| Statement of Matters Involved | 2-3 |
| Basis of this Court's Jurisdiction | 3 |
| Questions Presented | 3-4 |
| Reasons Relied on for Allowance of the Writ | 4-6 |
| Brief in Support of Petition | 7-14 |
| I. Opinion Below | 7 |
| II. Jurisdiction | 8 |
| III. Statement of the Case | 8 |
| IV. Errors Relied On | 8-9 |
| V. Argument | 9-13 |
| VI. Conclusion | 13-14 |
| Appendix | 15-16 |


## CASES CITED


| | |
|---|---|
| Bodden, R. K. v. Commissioner, (C. A. 5th) 50-1 U. S. T. C. 9341 | 5 |
| Commissioner v. Culbertson, 337 U. S. 733 | 2, 9 |
| Commissioner v. Tower, 327 U. S., 280 | 2, 9 |
| Ginsburg v. Commissioner, (C. A. 5th), 176 Fed. (2) 879; rehearing 176 Fed. (2) 884 | 4-5 |
| Harris, Anna, v. Commissioner, (C. A. 9th), 175 Fed. (2) 444 | 4 |
| Lusthaus v. Commissioner, 327 U. S. 293 | 2, 9 |
| Miller, Sam H. v. Commissioner, (C. A. 6th) 50-1 U. S. T. C. 9327 | 10-11 |

Page

Seabrook, L. W. v. Commissioner, (C. A. 5th) 176 Fed. (2) 605 ..... 4
Trepte, Walter v. Commissioner, (C. A. 9th), 175 Fed. (2) 444 ..... 4
Tomlinson, Elwyn White, v. Commissioner, (C. A. 5th), 50-2 U. S. T. C. 9354..... 5

## STATUTES AND RULES CITED

26 U. S. C. 1141(a) and (c) (1)..... 3
28 U. S. C. 1254 (1)..... 3
Federal Court Rule 52-(a)..... 13

## TEXTS CITED

Current Income Tax Aspects of Family Partnerships, T. V. Monahan, 36 Virginia Law Review, April 1950 ..... 14

## APPENDIX

26 U. S. C. 1141(a); (c) (1)..... 15
28 U. S. C. 1254 (1)..... 16
5 U. S. C. 1009 (e)..... 15

United States of America

In the

# Supreme Court of the United States

October Term, 1950

No.

CHARLES A. CAROLIN,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Your Petitioner, Charles A. Carolin, respectfully represents as follows:

## STATEMENT OF MATTERS INVOLVED

Petitioner seeks to bring before this Court a decision of the United States Court of Appeals for the Sixth Circuit, affirming a Tax Court decision disallowing a family partnership. The partnership was between petitioner and his wife, Helen E. Carolin. The case was submitted to the Tax Court prior to the decision of this Court in *Commissioner v. Culbertson,* 337 U. S. 733. The validity of the family partnership was decided and the facts were determined without benefit of that decision. The Tax Court applied sole tests of "vital services" and "original capital" and held the partnership to be invalid for income tax purposes. It failed to make any finding as to whether or not petitioner and his wife in good faith and acting with a business purpose intended to join in the conduct of the enterprise as partners. The word "intent" is nowhere mentioned in the Tax Court's opinion (R. 111-24).

The Tax Court decision was rendered June 1, 1949. On June 27, 1949, this Court rendered its decision in the *Culbertson* case. This Court, in the *Culbertson* case, was concerned with a similar Tax Court decision disallowing a family partnership without making any findngs as to the intention of the parties to join together as partners. Certiorari was granted to consider the Commissioner's claim that the principles of *Commissioner v. Tower,* 327 U. S. 280 and *Lusthaus v. Commissioner,* 327 U. S. 293 had been departed from by the Courts of Appeals. This Court held that the Tax Court had erroneously construed the Tower and Lusthaus decisions as setting out tests of "vital services" and "original capital" in determining the validity of the family partnership. Having failed to make any finding as to the intention of the parties to

join together as partners, the true test of a valid family partnership, the cause was remanded to the Tax Court for such findings.

On July 18, 1949, petitioner filed a motion for leave to file a motion for reconsideration out of time which the Tax Court denied (R. 2). The decision was appealed to the Court of Appeals below wherein petitioner urged in his brief that the case should be remanded to the Tax Court for further proceeding in conformity with the *Culbertson* case. The Court of Appeals below affirmed the Tax Court *per curiam* (R. 131). Petition for rehearing was filed, again alleging that the case should have been remanded to the Tax Court for further proceedings in conformity with the holding in the *Culbertson* decision (R. 133-5). This petition was denied (R. 136).

## BASIS OF THIS COURT'S JURISDICTION

Petitioner contends that this Court has jurisdiction to review the judgment here in question under the provisions of *26 U.S.C. 1141 (a) and (c) (1) and 28 U.S.C. 1254 (1),* (Appendix), and that the facts hereinbefore and hereinafter in this petition set forth bring the case within the statutes cited; *Commissioner v. Culbertson, supra.* The Court of Appeals decision was rendered April 19, 1950 and timely petition for rehearing denied June 1, 1950.

## QUESTION PRESENTED

Where, in a family partnership case, the Tax Court applying sole tests of "vital services" and "original capital", and determines that the partnership is not valid for

income tax purposes and makes no finding as to the intent of the parties to join together as partners, should the Court of Appeals on review of such decision remand the case to the Tax Court for determination of the question of intent in conformity with the *Culbertson* case?

The Court of Appeals answered this question in the negative.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decisions of the Tax Court and Court of Appeals below are contrary to the decision of this Court in the *Culbertson* case. The intent of the parties determines partnership status; not arbitrary tests of "vital services" or "original capital." It is the duty of the Tax Court to determine whether or not the parties in good faith intended to join together as partners. This Court has held that where there is not even an oblique reference to intent in a Tax Court decision, the case must be remanded to the Tax Court for determination of such intent, *Culbertson, supra,* (P. 748).

2. The decision of the Court of Appeals below conflicts with decisions of the Court of Appeals for the Fifth and Ninth Circuits. The Court of Appeals for the Ninth Circuit in two family partnership cases immediately subsequent to the Culbertson decision, *Walter Trepte v. Commissioner,* 175 Fed. (2) 444 (July 13, 1949) and *Anna Harris v. Commissioner,* 175 Fed. (2) 444, (July 13, 1949) reversed the Tax Court and remanded the cases for further proceedings in conformity with the Culbertson decision. The Fifth Circuit did likewise in *L. W. Seabrook v. Commissioner,* 176 Fed. (2) 605, (August 2, 1949) and in *Ginsburg v. Commissioner,* 176 Fed. (2) 879, (August

16, 1949) affirmed a District Court decision disallowing a family partnership case but on petition for rehearing vacated its judgment and reversed and remanded the cause to the District Court, 176 Fed. (2) 884, (September 13, 1949), to conform to its decision in the *Seabrook* case. The Fifth Circuit has subsequently in *R. K. Bodden v. Commissioner,* 50-1 USTC 9341, (June 9, 1950) and *Elwyn White Tomlinson, et al, v. Commissioner,* 50-2 USTC 9354; apparently on its own motion, remanded the cases to the Tax Court for further proceedings in conformity with the *Culbertson* case *prior to considering the appeal.* These were not reversals on the merits.

3. The administration of the Federal Income Tax law is a matter of public interest. Decision by this Court is necessary to remove the confusion that exists between the Courts of Appeal for the Fifth and Ninth Circuits on one hand and the Sixth Circuit on the other, in appeals to those circuits in family partnership cases. Harmony of decisions among the various Courts of Appeal is necessary for uniformity in the administration of the Federal Income Tax law.

The question involved is substantial. It affects the administration of the federal income tax laws. It concerns unanimity of procedure by the Courts of Appeal in family partnership cases. It involves the fundamental right of petitioner to a trial of the facts in this case and conclusions to be drawn therefrom upon proper legal criteria, without which petitioner is deprived of his day in court. Substantial sums are involved, deficiency having been assessed against petitioner of $15,371.06 for the calendar year of 1943 and $17,317.66 for the calendar year 1944 (R. 7).

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Sixth Circuit that this cause may be reviewed and determined by this Court, as provided by law, and that Petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that judgment of said Court of Appeals may be reversed.

CHARLES A. CAROLIN,
*Petitioner,*

By WILLIAM A. ALFS,
(Donald K. Tyler, *Of Counsel),*
*Attorneys for Petitioner.*

United States of America

In the

# Supreme Court of the United States

October Term, 1950

No.

CHARLES A. CAROLIN,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

### I.

### OPINION BELOW

The official report of the decision below (R. 131) is reported at 181 Fed. (2) 186. The findings of fact and opinion of the Tax Court (R. 111-24) are reported at 8 TCM. 548.

## II.

## JURISDICTION

1. The judgment to be reviewed is dated April 19, 1950 (R. 131). Timely petition for rehearing was denied June 1, 1950 (R. 136).

2. Statutory provisions and facts upon which this Court has jurisdiction are set forth in the petition for certiorari under captions "Statement of Matters Involved", "Basis for this Court's Jurisdiction" and Reasons Relied on for Allowance of the Writ."

## III.

## STATEMENT OF THE CASE

A statement of the facts as presented to the Tax Court are not necessary for a determination of the issue presented by this petition. The facts pertinent to the issue presented by this petition are set forth in the Petition for Certiorari under caption "Statement of Matters Involved."

## IV.

## ERRORS RELIED ON

1. That the Court of Appeals below erred in affirming the decision of the Tax Court.

2. That the Court of Appeals below erred in not remanding the case to the Tax Court for further proceedings in conformity with *Commissioner v. Culbertson*, 337 U. S. 733.

## V.

## ARGUMENT

For a period of three years subsequent to this Court's decision in *Commissioner v. Tower*, 327 U. S. 280 and *Lusthaus v. Commissioner*, 327 U. S. 293, it was the mistaken belief of the Tax Court, Court of Appeals, the Treasury and the bar that "vital services" and "original capital" were the decisive tests in the determination of whether or not a valid family partnership existed for tax purposes. It was in this atmosphere of mistaken belief that the Commissioner in the original instance disallowed the family partnership, (R. 10) and the case subsequently tried before the Tax Court with the resultant disallowance of the family partnership, (R. 119-23). No determination was made by the Tax Court as to any lack of bona fide intent on the part of petitioner and his wife that they be partners in the conduct of the foundry business, the Tax Court merely holding that Helen E. Carolin's services were not vital and that she contributed no capital originating with her. Within less than a month after the Tax Court's decision, this Court rendered its decision in *Commissioner v. Culbertson*, 337 U. S. 733, wherein this Court held it erroneous for the Tax Court to use sole test of "vital services" or "original capital" as essential to the validity of a family partnership. This Court said: "Not once in its [Tax Court] opinion is there even an oblique reference to any lack of intent on the part of respondent and his

sons to combine their capital and services "for the purpose of carrying on the business," (p. 743), and further stated that "The cause must therefore be remanded to the Tax Court * * *", (p. 748). No attempt was made by this Court to pass upon the facts of the case, for, as Mr. Justice Frankfurter stated in his concurring opinion, "It [Supreme Court] remands the case to the Tax Court because it is for that Court, and not for the Court of Appeals, to ascertain, on the basis of appropriate legal criteria, the existence of a partnership within the provisions of Internal Revenue Code Sec. 181 and 182 * * *" (p. 749).

The Tax Court in the first instance should have entered an order for retrial of the case when the *Culbertson* decision was brought to its attention and in failing to do so, the Court of Appeals should have done so. Mr. Justice Frankfurter in his concurring opinion in the *Culbertson* case stated (P. 752):

> "* * * Therefore, a finding by the Tax Court that that which has the outward appearance of an arrangement to engage in a common enterprise is not in fact such an associated business venture ought to be respected when challenged in another court, unless such a determination is wholly without warrant in fact, *or, as in the case, the wrong standards for judgment have been applied.*" (Italics supplied.)

That the Tax Court and Court of appeals below applied the wrong standards for judgment, "vital services" and "original capital", is evident from the reported syllabus to the decision of the Court of Appeals, in our case, 50-1 U. S. T. C. 9327:

> "Family partnerships: Inadequate services and contributions of capital: Evidence—The taxpayer

and his wife were not valid partners in the conduct of a foundry business, where it was found that the wife's contribution did not *originate with her* and that services rendered by her, consisting of clerical work in the evenings and on week-ends, *were not vital.*" (Italics supplied.)

The day following the denial of petitioner's petition for rehearing, the Court of Appeals below reversed a Tax Court decision disallowing a family partnership with full opinion, *Sam H. Miller v. Commissioner*, 50-1 U. S. T. C. 9327, and remanded the case to the Tax Court, in which we find the following language:

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, *Consolidated Edison Co., et al. v. National Labor Relations Board, et al.*, 305 U. S. 197. It was, however, not upon substantial evidence of the intention of the parties that the case was decided, but upon the basis of certain 'tests' * * *. Nowhere is found any conclusions as to whether or not the Millers in good faith and acting with a business purpose intend to join in the conduct of the enterprise—the true test of a valid family partnership * * *."

* * * * *

"Counsel for respondent argue in their brief that the Tax Court found there was no evidence of any real intention to make the children partners in the business. This is incorrect. The Tax Court made no findings as to intention with respect to the trusts. * * *

* * * * *

"Counsel for respondent submit that * * * it could be reasonably considered that the benefits in the trust, directly or indirectly retained by the petitioner and his wife blended imperceptibly with the

> normal concepts of full ownership, and that, therefore, the transfer to the children of real partnership interests was not intended. The argument is persuasive, *but in the absence of findings on this proposition, it will be necessary to remand the case as in Culbertson v. Commissioner, supra.*" (Italics supplied.)

It is significant that the bench was composed of Judges Hicks, Allen and McAllister in our case and Judges Martin, McAllister and Miller in the *Miller* case, indicating a division of thinking within the Court of Appeals below on the question before this court.

The fact that the Commissioner has not sought certiorari in the decisions of the Fifth and Ninth Circuits remanding family partnership cases to the Tax Court indicates a concurrence with the decisions of those courts that, in family partnership cases wherein the Tax Court has made no findings as to the intention of the parties, the cases should be remanded to the Tax Court.

We believe the language of the Fifth Circuit in *R. K. Bodden, supra,* expresses the proper procedure to be followed in cases such as the one at bar:

> "We are of the opinion that before considering the petition for review of the Tax Court's decision in this case, we should have the benefit of its re-examination of the questions and its re-determination of the facts in the light of the opinion in the *Culbertson* case.
>
> "We, therefore, order a remand of this cause to the Tax Court for further proceedings in conformity with the opinion of the Supreme Court in the Culbertson case with the right in either of the parties to offer such further or additional positions as may be appropriate in the light of that opinion."

An examination of the Tax Court opinion in that case, 8 T. C. M. 243, indicates that the Tax Court passed directly on the question of intent of the parties, nevertheless the Fifth Circuit remanded and, at the time of writing this brief, certiorari has not been authorized by the Commissioner.

## CONCLUSION

Petitioner does not seek, by this petition, to have this Court pass upon the factual pattern of this case. That is for the trial court. Petitioner does seek the right to present that factual pattern and have proper findings thereof and conclusions drawn therefrom by the trial court. This Court's decision in the *Culbertson* case was so new and its far reaching implications not fully apparent when petitioner asked the Tax Court to reconsider its decision. But by the time this case reached the Court of Appeals below, two other Courts of Appeal had spoken on the subject, the Fifth and Ninth, and these circuits construed this Court's opinion in the *Culbertson* case to impose a duty on the appellate court to remand to the Tax Court family partnership cases decided without the benefit of the *Culbertson* decision. The Court of Appeals below has taken a contrary view in our case. The Commissioner, by his failure to apply for certiorari in the Fifth and Ninth Circuit decisions, has concurred in the procedure there followed.

Unless this Court exercises its power to review the decision below, a serious injustice will be sustained by petitioner. Without the benefit of the words of this Court in the *Culbertson* case the Tax Court did not properly find facts and conclusions of law required of it under Federal Court Rule 52 (a). Had the *Culbertson* decision

been before that Court, a different result might have occurred.[1]

Petitioner being a resident within the jurisdiction of the Court of Appeals below finds himself without the right of a retrial because that Court did not construe the *Culbertson* decision as obligatory to remanding family partnership cases of this nature whereas two other Courts of Appeal do. Petitioner suffers the further misfortune that the Court of Appeals below is of itself divided on this question. Where a federal law is involved its administration should be carried out harmoniously not only between the various Courts of Appeal but within each circuit also. To deny the writ prayed for will make petitioner the victim of his residence and the chance of the judges who sit on the day of the hearing of the appeal below.

We respectfully submit, that for the reasons above stated, the Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

WILLIAM A. ALFS,
(Donald K. Tyler, Of Counsel)
*Attorneys for Petitioner.*

---

[1] See *Current Income Tax Aspects of Family Partnerships—T. V. Monahan, 36 Virginia Law Review,* April 1950, where this observation is made (p. 370):

> "The opinions of the lower courts since the Culbertson decision have shown that the latter by and large has been interpreted favorable to the taxpayer. The disclaimer of 'vital services' and 'contribution of outside capital' as indispensable ingredients of a valid family partnership has resulted in recognition being granted to a greater number of such partnerships in cases where a valid intent to transfer the economic factors actually producing the income has been shown. * * *".

## APPENDIX

5 U. S. C. Sec. 1009 (e):

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

* * * * *

INT. REV. CODE, Sec. 1141:

> "(a) Jurisdiction.—The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in Civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the

Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code."

"(c)(1) Upon such review, such courts shall have power to affirm, or, if the decision of the Tax Court is not in accordance with law, to modify or reverse the decision of the Tax Court, with or without remanding the case for a rehearing as Justice may require."

28 U. S. C. Sec. 1254:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

'(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *.'"

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 13 |
| Conclusion | 15 |


## CITATIONS

Cases:


| | |
|---|---|
| *Commissioner* v. *Culbertson*, 337 U. S. 733 | 13, 15 |
| *Commissioner* v. *Tower*, 327 U. S. 280 | 13 |
| *Lusthaus* v. *Commissioner*, 327 U. S. 293 | 13 |


Statute:


| | |
|---|---|
| Internal Revenue Code, Sec. 22 (26 U.S.C. 1946 ed., Sec. 22) | 2 |